TAN ENG HOE v. LIANG HOOI KIANG

[C.A. (Thomson C.J., Hill J.A. and Ong J.) December 12, 1960]

[K.L. — F.M. Civil Appeal No. 43 of 1960]

Practice and Procedure — Appeal — Adjournment — Right to counsel — Discontinuance — Judge's discretion — R.S.C. 1957 O.26 r.1 — Parties — Temple — Whether can be sued — Agency — Liability in contract.

Adjournment — Discretion of trial Judge.

Contract — Building contract — Variations in works — Architect's "certificate of payment."

This was an appeal against the decision of the High Court at Ipoh dismissing a claim by the appellant for $47,350.93 as being the cost of certain extra works on a temple building which he alleged he had carried out at the respondent's request. The grounds of appeal were that (i) the learned trial Judge ought to have granted the appellant's application for an adjournment to enable him to retain senior counsel, alternatively that he ought to have allowed the appellant to discontinue with liberty to file a fresh action and that having rejected both applications, he ought not to have refused the appellant an opportunity to subpoena witnesses required to testify at the hearing; (ii) the trial Judge had erred in holding that the wrong party had been sued, because the temple was not a juristic person and as such was incapable of entering into a contract and there was a valid cause of action against the respondent as proprietor of the land and owner of the buildings and as one who had authorised the appellant to carry out the additional works.

Held: (1) the trial Judge was justified in rejecting the second application as the appellant had deliberately intended not to be ready for the hearing on the date fixed;

(2) the refusal to grant an adjournment at the trial was a matter within the discretion of the trial Judge and the Court of Appeal would be slow to interfere with his discretion unless it appeared that the result of an order refusing the adjournment had been to defeat the rights of the applicant altogether and to do that which the Court of Appeal was satisfied was an injustice to him, (following *Palaniappa Chettiar* v. *Arunasalam Chettiar* (1);

(3) discontinuance is a matter entirely within the Judge's discretion and in this case the trial Judge rightly held that the reason for not allowing an adjournment was a sufficient reason for not allowing discontinuance, which if permitted would have rendered the respondent liable to further harassment by the appellant with another action on the same subject matter;

(4) although an unincorporated association cannot, as associations, become parties to contracts, the liability for work done and labour done for the benefit of such associations is determined according to the rules of law in regard to agency, and the parties who gave the orders for the work to be done are the persons liable upon the contract (following the principles as stated in *Halsbury* (2nd Edn.), vol. 35, p. 458);

(5) work and labour done or money expended by one man to preserve or benefit the property of another do not create any lien upon the property saved or benefited, nor, even if standing alone create any obligation to repay the expenditure (following Bowen L.J. in *Falcke* v. *Scottish Imperial Insurance Co.* (4)).

Cases referred to:—

(1) *Palaniappa Chettiar* v. *Arunasalam Chettiar* F.M. Civil App. No. 34/59 dated 23.4.1959.

(2) *Maxwell* v. *Keun* [1928] 1 K.B. 645.

(3) *Fox* v. *Star Newspaper Co.* [1898] 1 Q.B. 636.

(4) *Falcke* v. *Scottish Imperial Insurance Co.* (1887) 34 Ch. D. 234, 248.

COURT OF APPEAL.

N. Sharma (*Peh Swee Chin* with him) for the appellant.

Dato Sir Roland Braddell (*F. C. Arunasalam* with him) for the respondents.

Cur. Adv. Vult.

Ong J.: This is an appeal against the decision of the High Court at Ipoh dismissing a claim by the appellant for $47,350.93 as being the cost of certain extra works on a temple building which he alleged he had carried out at the respondent's request.

The appellant is a building contractor and the respondent is the superintendent of a Chinese Temple known as Tet Shen Tong Temple at Jalan Bendahara, Ipoh. At some date prior to the issue of the writ in this action the respondent became the registered proprietor of a piece of land on which the temple now stands. It would appear that some time in 1953 the Teochew community of Ipoh decided to put up a temple for public worship with moneys to be contributed by its devout members, and a Temple Committee was set up, with one Choo See Kee as Ghairman and one Khoo Meng Kee as Vice-Chairman and Treasurer. The respondent was not on this Committee, although she was in some way interested in the plans for the building as early as December 10, 1953.

On or about February 27, 1954, a building contract drawn by an architect in standard form was signed by the appellant as contractor, and by the said Choo See Kee and Khoo Meng Kee, representing the Tet Shen Tong Vegetarian Temple, therein described as "the owner". The contract was for the construction within 8 months of an outer shrine and out-buildings of a temple on the "lot of the owner" according to plans approved by the Kinta Town Board and to the additional specifications attached to the said contract, at the total cost of $77,000.

The appellant alleged that he duly completed the said works and was paid the sum of $77,000. He further alleged what formed the subject matter of his action, namely, that—

> "Apart from the above works and at the same time from March to October 1954, the plaintiff at the request and order of the defendant carried out additional constructional works not provided for in the original plan No. TBK. (B) 186/47 costing $47,350.93 inclusive of labour and materials."

On August 10, 1955 the appellant instructed a solicitor Mr. C. N. Lim to demand from the respondent payment within 14 days of the sum of $31,092.56 as being the balance due for alterations and additions to the temple executed at her request. Four years later, on August 29, 1958 the appellant commenced his action. The defence was delivered on or about September 11, 1958 and in due course the action came up for trial on May 11, 1960 before Smith J., who dismissed the claim with costs. Against his decision the appellant now brings this appeal.

The grounds of appeal fall under two main heads, the procedural and the substantive. Under the former it was argued that the learned

trial Judge ought to have granted the appellant's application for an adjournment to enable him to retain counsel, alternatively that he ought to have allowed the appellant to discontinue with liberty to file a fresh action; and that having rejected both applications, he ought not to have refused the appellant an opportunity to subpoena witnesses required to testify at the hearing.

I do not think there are any merits whatsoever in these grounds of appeal. The trial was fixed for June 13, 1959 but was put off at the instance of the appellant. Subsequently his then solicitor Mr. K. C. Chan Jr. consented on February 27, 1960 to the trial being set down for May 11, 1960. On March 25, 1960 the appellant, having been informed by Mr. Chan that the latter was about to retire from practice, instructed him to apply for postponement of the hearing to July 15 on the ground that he, the appellant, was intending to go to Thailand on April 1 for a period of about three months. On March 30 Mr. Chan replied expressing his doubt "whether it would be possible to obtain further adjournment of the hearing of this suit now fixed for 11th and 12th May 1960" and advising the appellant that his papers had been handed to Messrs. Wahab, Singh & Peh of Ipoh, when he should consult as to the future conduct of the action. Thus matters stood until May 11, whom respondent's counsel opposed an application for adjournment made by Mr. Peh, acting for the appellant in place of Mr. Chan, on the ground that the appellant desired to retain senior counsel. This application being rejected by the Judge, Mr. Peh then asked leave to discontinue the action under Order 26 rule 1, with liberty to bring a fresh action, on the ground that the appellant by his oversight had put himself in a difficult position. The learned trial Judge thereupon proceeded to examine the appellant, eliciting from him finally an admission that he had been well aware since the end of March of the date of hearing, that he had in fact not gone to Thailand at all, and that he desired a postponement merely for the purpose of retaining Mr. Lim Cheng Ean of Penang as counsel. It is therefore abundantly clear that, in spite of six weeks notice, he had deliberately intended not to be ready for the hearing on the date fixed, and that the responsibility lay solely with him. Under these circumstances the Judge rejected the second application and, in my view, he was entirely justified in doing so.

Upon the question of adjournment I need only quote from the judgment of Dato Sir James Thomson C.J. in *Palaniappa Chettiar* v. *Arunasalam Chettiar*[1] in which the same point was raised before the Court of Appeal:

> "With regard to the refusal to grant an adjournment, it is well settled law that the refusal of an adjournment of a trial is a matter within the discretion of the trial Judge and the Court of Appeal will be slow to interfere with his discretion unless it appears that the result of an order refusing the adjournment has been to defeat the rights of the applicant altogether and to do that which the Court of Appeal is satisfied is an injustice to him (see *Maxwell* v. *Keun*[2]) ..... It is wrong to say as is frequently said, that a litigant is entitled to be represented by the counsel of his choice. The true statement is that he is entitled to be represented by the counsel of his choice if that counsel is willing and able to represent him. Here counsel although no doubt willing was not able to appear. The appellant had known for at least a week and probably longer that the counsel of his choice would be unable to appear and he was not entitled to insist as he attempted to insist that the case should be adjourned until the counsel of his choice was able to appear."

As to discontinuance, it is again well settled that it lies entirely within the Judge's discretion whether or not to allow a plaintiff to discontinue with the right of bringing another action. The object of Order 26 rule 1 is that "after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into Court, shall not be able to escape by a side door and avoid the contest ..... and it is for the Judge to say whether the action shall be discontinued or not and upon what terms" (*per* Chitty L.J. in *Fox* v. *Star Newspaper Co.*[3]). With respect, I think Smith J. rightly held that the reason for not allowing an adjournment was a sufficient reason for not allowing discontinuance which, if permitted, would have rendered the respondent liable to further harassment by the appellant with another action on the same subject matter.

Having had both his preliminary applications dismissed, it seems to me that the appellant's subsequent applications during the hearing for an adjournment to subpoena his witnesses were, in the light of the facts disclosed, frivolous and even impertinent. I can think of no valid reason why the person required to explain his accounts — who probably was his clerk — should need to have been served a subpoena to procure his attendance, while, as to Mr. N. A. Chin, the architect, who resided in Ipoh, it was never suggested that he was unwilling to attend Court or that he had ever been requested to do so. Indeed the appellant was given the opportunity of calling this witness on the following day, and the learned trial Judge did adjourn the hearing for that express purpose, but the appellant quite evidently elected not to avail himself of the opportunity which had been given to him. I have no hesitation in holding that the appeal on the procedural grounds fails.

I come now to the substantive grounds of appeal, of which the only material one is that the learned trial Judge has erred in holding that the wrong party had been sued. I hope I am not in error myself if I understand the argument of appellant's counsel to be in effect as follows: (a) that the temple, not being a juristic person, was incapable of entering into a contract with the result that there was no enforceable contract and no one liable upon an action thereon, (b) that, in any case, even if there might be some cause of action against the Chairman and Vice-Chairman who signed as representing the temple, there was still a valid cause of action against the

respondent on the ground that she had requested or authorized the appellant to carry out the additional works, and alternatively on the ground that, as proprietor of the land, the respondent was also owner of the building and she had had the benefit of those works.

With respect, I think the first proposition is fallacious. The principles to be applied are stated in *Halsbury* (2nd Ed.) Vol. XXXIV, page 458, as follows :

" Associations which are unincorporated, and which therefore are not legal entities, cannot, as associations, become parties to contracts. The liability for work and labour done for the benefit of such associations is determined according to the rules of law in regard to agency, and the parties who gave the orders for the work to be done are the persons liable upon the contract. Persons may, however, become liable on such contracts when they have given another person authority to make the contract, or when they have so conducted themselves as to lead the person employed to do the work to believe that they had given such authority, and that person acts in such belief."

With regard to the second proposition, the alternative ground may first be disposed of briefly. There is no evidence whatsoever on the record that the respondent became the registered proprietor of the land before all the additional works on the temple had been completed. Indeed all the evidence, such as there is, points to the contrary. Khoo Meng Kee, the Vice-Chairman & Treasurer said that he was the original proprietor of the land, and the respondent's uncontradicted evidence that she never signed any of the building plans is corroborated in the several plans that the appellant had produced, none of which bears any signature bearing the remotest resemblance to hers. It is well-known that building plans submitted for Municipality or Town Board approval must bear the signature of the registered proprietor. The answer to the appellant's argument on this point is to be found in most appropriate words in the judgment of Bowen L.J. in *Falcke* v. *Scottish Imperial Insurance Co.* (4)

" The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."

There now remains only the contention that the respondent is liable to pay for the additional works because she had requested or authorised them. The learned trial Judge took the view that, since clause 6 of the building contract provided that the architect was to act in all matters under the contract on behalf of the "owner", and all variations in the works in so far as they were incorporated in amended plans by the architect were made by him as agent of the "owner" referred to in the contract, such "owner" must be the person or persons liable. With respect I entirely agree with his reasoning.

I should add that two other clauses in the contract are of material importance. Clause 10 provides that "any alterations whether as extras or omissions shall not vitiate this contract ... and all such extras or omissions shall be allowed for in the final settlement of account, but in no case will the contractor be allowed any extra payment without an order or written authority from the architect." Clause 17 further provides that "the owner shall, each time upon the presentation of the architect's certificate of payment, pay to the contractor an amount equivalent to that as stated in the certificate. An architect's certificate shall be the essence of this agreement in respect of payments to the contractor." At the hearing no certificate had been proved to have been given by the architect in respect of any of the extras for which the claim was made. I am therefore of opinion that, apart from the question of liability on the part of any person or persons under the contract, the appellant had entirely failed to prove his claim, and the learned trial Judge was right in dismissing the action with costs.

Accordingly I would dismiss this appeal with costs and order that the deposit paid into Court by the appellant be paid out to the respondent on account of such taxed costs.

Thomson C.J. and **Hill J.A.** concurred.

Appeal dismissed.

Solicitors: *Wahab, Singh & Peh; Braddell & Ramani.*

GOVERNMENT OF THE FEDERATION OF MALAYA v. SURINDER SINGH KANDA

[C. A. (Thomson C.J., Hill J.A. and Neal J.) December 9, 1960]

[K. L. — F.M. Civil Appeal No. 30 of 1960]

Constitutional Law — Federation of Malaya Constitution, Arts. 4, 132, 135, 139-141, 144, 148, 160, 162, 174-176 — Dismissal of Police Officer — Power of Commissioner of Police — Police Service Commission.

Police Ordinance, 1952, ss.9, 10, 19, 45 and 47 — Police Regulations, 1952.

Interpretation and General Clauses Ordinance, 1948, ss.14 and 29 — Meaning of "Subject to existing law and this Constitution" — Modification.

Natural justice — "Reasonable opportunity to be heard" — Bias.

Appeal — Cross-appeal — What is.

The respondent, an Inspector in the Royal Federation of Malaya Police Force was first appointed on probation in 1951 and permanently appointed to the rank of Inspector on June 1, 1953. On July 7, 1958 he was dismissed by the Commissioner of Police. Having exhausted his departmental rights of appeal, he commenced these proceedings on October 1, 1959. He asked for a declaration and other consequential reliefs stating that his purported dismissal on July 7, 1958 was void and inoperative and of no effect and that he was still a member of the said Police Force because: (a) the dismissal had been